ABD. RASIP ABD. KADIR

v.

TAN AH TEE

HIGH COURT MALAYA, JOHOR BAHRU
MAHADEV SHANKAR J
[CIVIL APPEAL NO. 147 OF 1980]
19 OCTOBER 1983

TORT: *Negligence - Collision between motorcycle ridden by plaintiff and lorry -Whether contributory negligence by plaintiff.*

DAMAGES: *General damages - Quantum - Fractures and injuries - Actual and future loss of earnings - Award reduced by 50%.*

There was a collision between a motorcycle and a lorry on a straight road at night. The road was lit. The lorry overtook the motorcycle and stopped in front of it causing the motorcycle to hit the rear of the lorry. The plaintiff was the rider of the motorcycle. The plaintiff sustained fractures of the left acetabulam, left radius, inferior ramus and left patella; dislocation of the left ulna; and bruises abrasions and lacerations. He suffers from pain in the left forearm, left hip and left knee and is unable to carry weights. The plaintiff owned a farm which he converted into a banana plantation because of his incapacity.

Held:

[1] In the absence of rebutting evidence, it was found that the lorry caused the collision when it overtook the motorcycle and came to a stop on the left side of the road.

[2] The plaintiff failed to take proper care of his own safety as he did not give any evidence of the speed at which he was travelling and any evasive action he took or ought to have taken to avoid the collision. The verge was fairly wide on both sides and there was no on-coming vehicles. There was an absence of emergency brake marks from the plaintiff's motorcycle.

[3] (a) A global sum of RM40,000 was awarded for his injuries, pain and suffering and loss of amenities as general damages.

(b) The actual loss of earnings from the date of the accident to the date of judgment was RM27,900.

(c) The future loss of earnings was RM39,870.78.

(d) The total award for the plaintiff obtained from an addition of the figures in (a), (b) and (c) is RM107,770.78 The global award was reduced by 50% as the plaintiff was equally liable. Judgment was entered for the plaintiff in the sum of RM53,885.39.

(e) Interest at 8% p.a. on the sum of RM33,950.00 (i.e. half the global award less the award for the loss of future earnings) was awarded.

(f) The plaintiff was awarded costs.

For the plaintiff - Jegatheeson; M/s. John Ang & Jega
For the defendant - Devadas (Low with him); M/s. Thakurta & Low

JUDGMENT

Mahadev Shankar J:

The plaintiff is a farmer. He was 44 years old at the date of the trial.

On 20 May 1979 at about 8.30 p.m. he was riding his motorcycle No. JP 4648 along Jalan Benut towards Simpang Rengam. At about the 2½ milestone along that road he collided with motor lorry No. JL 5283.

The road at the scene was straight. It was not lit. The defendant did not appear at the trial and the Court was left to decide how this collision took place from the evidence of the plaintiff himself and PW2 Abu Shaari bin Laziman. He was driving a motor bus at the time and following the plaintiff.

On 23 May 1979 the plaintiff made a police report. In it he stated that he was following a motorcycle for about 3 miles when he unknowingly collided into a lorry in front of him. He became unconscious and woke up in the Hospital at Johore Bahru.

The lorry driver Tan Ah Tee also made a police report at about 11.10 p.m. that day. This report is contained in the agreed bundle of documents.

The agreed bundle also contained a sketch plan and key. This shows the road to be 16 feet 4 inches wide with a verge on the left facing Simpang Rengam of 8 feet 8 inches and the verge on the right at 10 feet 6 inches

There is a blood spot near the centre of the road 5 feet 5 inches from the left verge facing Simpang Rengam.

The motorcycle is shown in the sketch plan, right up against the rear of the lorry. The lorry itself is shown parked on the left side of the road facing Simpang Rengam. The rear wheel of the motorcycle is stated to be 5 feet 2 inches from the blood spot. From this it can be inferred that the rear of the lorry was about 10 feet from the blood spot taking the length of the motorcycle to be say 5 feet. The rear off-side of the lorry is stated to be 12 feet 8 inches from the right verge facing Simpang Rengam. From this I deduce that the lorry was projecting into the road for a distance of 3 feet 8 inches.

There were no brake marks or tyre marks at the scene. At the trial the plaintiff gave a graphic account of how he was travelling along that road about 3 to 4 feet from the left verge. He had been following another motorcycle which was about 3 telephone posts away from him. At the scene of the accident a lorry overtook him, cut right across and suddenly stopped. He was unable to avoid a collision which took place about 3 to 4 feet from the left verge of the road. He lost consciousness and came to himself at the hospital.

It will be noticed here that the plaintiff did not give any indication of the speed at which he was travelling. Nor did he give any evidence as to any evasive action he took or might have taken to avoid this collision.

The cross-examination did not assist me much since the defendant could not call any evidence to rebut the plaintiff's story. The suggestions made to the plaintiff that the lorry did not overtake him was denied and the matter consequently was not taken any further except for the discrepancies between the evidence and the police report.

PW2 Abu Shaari bin Laziman stated that he was travelling at about 45 m.p.h. approaching the scene of the accident. Ahead of him was a motorcycle about 60 to 70 feet away. He did not notice any other motorcycle in front of this motorcycle.

Then he noticed a lorry overtaking him. He says that the lorry was speeding. It overtook him, cut in front of the motorcycle, and came to a sudden stop by putting on its emergency brakes.

However he did not hear any braking noise although he does say that he saw the rear stop lights of the lorry coming on. The lorry stopped about 3 to 4 feet from the verge and the plaintiff merely ran into the rear of the lorry.

I could not help feeling that PW2 gave his evidence with some considerable sympathy for the plaintiff. Curiously, although he did get down and take the plaintiff to hospital he says he did not have any conversation with the attendant or the driver of the lorry. This omission is even more puzzling when viewed against his evidence that he, PW2, knew the lorry driver because they had passed each other before.

On the other side of the scales there is the police report of the defendant in the agreed bundle. In it he states that he wanted to stop on the left verge and suddenly heard a bang from the rear. But the defendant did not appear in Court.

In the absence of rebutting evidence the Court must hold that the lorry did overtake PW2 and the plaintiff before it came to a stop on the left side of the road. The Court must also hold on the evidence that a collision did take place between the plaintiff's motorcycle and the rear of the motor lorry.

But the circumstances in which the collision took place do indicate that even if the plaintiff's evidence is taken at face value it must be held that the plaintiff did himself contribute to this accident by failing to take proper care in his own safety.

Since PW2 was travelling at 45 m.p.h. it stands to reason that the plaintiff himself must have been going at the same speed.

The direction and speed of the defendant's lorry as described by PW1 and PW2 leads to the inference that the lorry was going considerably faster than 45 m.p.h. A lorry going in excess of 45 m.p.h. cannot come to a sudden halt. The act of stopping involves a movement forward called the stopping distance.

There is no evidence before the Court as to what the plaintiff was doing during this critical period. Since there were no on-coming vehicles and the verge was fairly wide on both sides, I hold that it was open to the plaintiff to veer left or right but this he obviously failed to do.

The absence of any brake marks from the lorry indicates that if in fact it came to a sudden stop in the manner described the stopping distance was much further than the normal distance required to stop a lorry at a speed in excess of 45 m.p.h.

The absence of any emergency brake marks from the plaintiff's motorcycle indicates that he did not take any action to stop either.

The Court therefore assesses the degree to which each party was negligent to be 50% in all the circumstances of this case.

I now turn to the question of quantum. The plaintiff sustained multiple fractures from the accident. He had a fracture of the left acetabulam with posterior dislocation of the left hip. He also had a fracture of the lower third of the left radius with a dislocation of the ulna, fracture of the inferior ramus of the pubic bone and fracture of the left patella. In addition to

the fractures he also sustained bruises, lacerations and abrasions. A first operation was done for reduction of the dislocation of the left hip and the left radius. A partial patellectomy was also done at the left knee and the plaintiff was discharged from hospital on 23 June 1979.

These injuries precluded him from carrying on with his occupation as a farmer whilst he was under active treatment. Thereafter he was left with residual disabilities by way of pain in the left forearm, inability to carry weights, and he also had pain in the left hip and left knee.

When he was seen on 18 December 1980 for a specialist medical report it was found that he walked without any noticeable limp, and was able to squat fully. There was some limitation of movement in the left forearm and the left hip revealed 15 degrees of abduction deformity and 30 degrees of flexion deformity of the joint. There was also 20 to 30 degrees limitation of abduction and of internal rotation. Osteoarthritic changes were also indicated. In the course of the next 5 to 10 years it was suggested that he may require an artificial hip joint.

Apart from pain and suffering, residual disabilities, and loss of amenities, the plaintiff also claimed that he suffered a loss of income for the first two years until about January 1981. For this loss, he claimed that he should be paid RM18,000.

From August 1980 up to the date of the trial on 23 August 1983 the plaintiff claimed a partial loss of income at the rate of RM1,000 per month.

From the date of the trial up to the end of his working life the plaintiff claimed for prospective loss of earnings at the rate of RM700 per month for 12 years. The actuarial figures for this sum is RM74,451.31.

On the basis of the authorities he cited the Counsel for the plaintiff submitted that the hip injury was worth RM27,000. The patella and patellectomy were worth RM5,000 and the injury to the radius and ulna was worth RM18,000.

The claims resulted in the total claim of the plaintiff amounting to RM142,451.31.

Counsel for the defendant also submitted a list of authorities. It was submitted that all the fractures of the plaintiff was only worth RM30,000.

As to the actual loss of earnings both past and future and the loss of earning capacity, defence Counsel submitted that the plaintiff could have mitigated his damages by employing alternative labour at RM300 to RM400 per month. This would have reduced his actual loss of income to about RM1,000 per month. From the time he was able to continue working the defence Counsel has submitted that the loss should be calculated at the cost of hiring alternative labour at RM400 per month and a multiplier of 6 years has been suggested.

Having considered these submissions I find as follows. The plaintiff is married. His eldest daughter is 20 years old. His second child is a son aged 18. He has 10 children in all and the youngest is 2 years old. He said in evidence that he hoped that his children would farm the land and therefore continued to pay premiums on the land even though he could not farm the land himself after the accident.

Although he stated in his evidence-in-chief that his average income was a net amount of RM1,500 per month, he was not able in cross-examination to explain why he did not employ contract workers to continue to look after the property. He also stated that because of his incapacity, he converted the farm into a banana plantation with the help of his brother in 1981.

I find it difficult to understand why, if the plaintiff's brother could have been called to assist in 1981 he should not have been brought in earlier. There is also no explanation why if the plaintiff intended that his children should take over the farm, they could not assist him to keep it going. The Court is unable to accept that farming is such an esoteric art that it cannot be carried on under supervision by labour which may to some extent be unskilled.

No books of account or documents of any kind were produced by the plaintiff in support of his claim that he was earning RM1,500 per month. The plaintiff called on official from the Farmers' Cooperative which is said to have assisted the plaintiff with marketing and services. This witness however had only joined the Cooperative after 1981. He did not produce any records either. He is not an expert on farming technology. He gave it as his opinion that the nett income from the plaintiff's vegetable farm per acre would be about RM1,000. In other words for 6 acres the plaintiff's estimated income, according to this witness, was approximately RM6,000 per month. It is noted that this estimate was way beyond the plaintiff's own claim.

Another witness was called from a firm which buys vegetables wholesale. He stated that the plaintiff had sold a total of RM7,751.40 worth of vegetables in 1978. This gives an average monthly yield of RM645.95 In 1979 the total sales were RM2,376.11 On the assumption that the plaintiff did not effect any sales from the date of his accident in May 1979, the average for the 4 calendar months before the accident is RM594.02.

Apart from the plaintiff's say-so and the very generous estimates of the Cooperative officer there was no credible proof that the plaintiff sold a gross amount of RM2,500 worth of vegetables per month before his accident.

I am therefore compelled to hold that the figures given by the plaintiff have been considerably exaggerated and have not been proven to the Court's satisfaction. I am further of the view that if the Plaintiff did allow his farm to go to rot before he converted it to a banana plantation in 1981, he did not take adequate steps to mitigate his damages in respect of any loss of income.

In these circumstances I assess that the actual loss of earnings from the date of accident in May 1979 up to January 1981 be in the sum of RM11,400 calculated at RM600 per month for 19 months.

From January 1981 up to the date of judgment I assess the loss of earnings to be in the order of RM500 per month which gives us a figure of RM16,500.

Then we must look at the future loss of earnings. This I assess at RM300 per months for a period of 11 years purchase which gives a yield of RM39,870.78.

To turn now to the fractures and injuries, pain and suffering, and loss of amenities, I award a figure of RM25,000 for the hip injury plus the future operations, RM5,000 for the patella and the patellectomy, another RM5,000 for the radius and ulna and a further sum of RM5,000 for all the minor injuries he suffered, and the prospective osteoarthritis he is expected to suffer together with any further surgery which may be required flowing from the injuries he has sustained.

In the result the total award for the plaintiff obtained from an addition of these figures is RM107,770.78.

Since I have held the plaintiff to be equally to blame for this accident, the global award will be reduced by 50% and there will accordingly be judgment for the plaintiff in the sum of RM53,885.39.

Interest will run at the rate of 8% per annum on the sum of RM33,950 (i.e., half the global award less the award for the loss of future earnings) from the date of filing of the writ up to the date of realisation.

The plaintiff will also have his costs. The Court orders accordingly.

Also found at [1984] 1 CLJ 240